CONDITIONS FOR PHYSICAL ACCESS

Issue 4: In promoting a competitive market, what, if any, restrictions to direct access to customers in MTEs should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Recommendation: The Commission recommends that ILECs, ALECs, landlords, and tenants be encouraged to negotiate all aspects of MTE access in good faith. Negotiations should be based on the premises of reasonable, nondiscriminatory, and technologically neutral access to MTEs. Further, the Commission recommends that tenants should be responsible for obtaining all necessary easements. Finally, the Commission recommends that exclusionary contracts are against public policy and should be prohibited. Marketing agreements are not as anticompetitive as exclusionary contracts. However, the existence of any such agreement should be disclosed to potential tenants.

Summary of Initial Positions

BellSouth: Until such time as BellSouth is no longer obligated to serve all end users in its franchised territory, and until such time as BellSouth is totally freed from rate regulation and FPSC-imposed service indices, all subscribers should have the right to subscribe to those services which have been designated by legislation as being in the best interests of the state.

GTE: Any restrictions on direct access should be strictly constrained to reasonable security, safety, appearance, and physical space limitations. Exclusionary contracts are never appropriate.

Sprint: Restrictions to direct access to customers in an MTE should only be allowed upon a compelling showing that the restriction is in the public interest.

Cox: The only restriction the FPSC should allow for direct access to customers in an MTE should be those currently listed in the call aggregator rule for transient facilities.

e.spire: Restrictions on access to MTEs will discourage development of local competition. Any contract that has the effect of discouraging nondiscriminatory building access should be deemed illegal.

Intermedia: Companies should have access to MTEs on a competitively neutral basis that preserves the tenant's choice of carriers and that does not violate the property owner's rights.

OpTel: All exclusionary contracts that predate the effective date of any statutory change implementing access policies should be voidable upon a bonafide request of a certificated telecommunications company. The FPSC should not allow any carrier to enter into an exclusionary contract that prohibits a customer from being able to select a competitive alternative.

TCG: MTE owners should be able to establish reasonable and nondiscriminatory physical and financial conditions for the purpose of protecting their property from damage or losses caused by telecommunications seeking to serve tenants in MTEs.

Teligent: Under no circumstance should the FPSC tolerate exclusive telecommunications carrier access to an MTE. MTE owners should not be placed in the position of dictating to customers which service providers they can and cannot use.

Time Warner: Reasonable restrictions will not adversely impact the development of competition so long as such restrictions are applied to all providers in a nondiscriminatory and competitively neutral manner. Access to the regulatory process should be reserved as a vehicle for dispute resolution in a similar manner as provided for with interconnection agreements.

WorldCom: Reasonable restrictions to direct access to customers in MTEs should be considered only in cases where there is a lack of physical space, structural compatibility, and in some cases, building aesthetics.

BOMA: There should be no direct access by telecommunications carriers to tenants of MTEs, unless the same is expressly consented to by the building owner. Exclusionary contracts are the exception and not the norm in the commercial office building industry.

CAI: Community associations must control all aspects of access to their property including the right to bar telecommunications service providers from their property.

FAA: Property owners must retain full authority to control the location and manner of all installations. No direct access should be allowed for tenancies of less than 13 months and exclusive contracts should be encouraged.

FAHA: Supports continued application of STS rules for applicable facilities.

ICSC: Property owners should be able to impose their own conditions for access. Limitations on a building owner's property rights are unconstitutional under the Fifth Amendment to the United States Constitution.

REALTORS: Physical entry and space use should be controlled by the landlord through contract negotiations. Exclusionary contracts may be appropriate in existing facilities due to space limitations, costs of retrofit, efficiency, security concerns, and other reasons.

Analysis

In addition to the demarcation point discussion, property owners and landlords raised a number of physical access issues such as: easements; cable placement to, in, on, and between buildings; floor space requirements; conduit sizing; access for repairs; aesthetics; safety; and liability. All of these issues were coupled with the position of landlords that to mandate unrestricted access to tenants would constitute an unconstitutional taking. Facilities-based ALECs raised concerns about access being restricted by exclusionary contracts, marketing contracts, excessive fees, unresponsive landlords, and space limitations. As in addressing other issues in this report, the FPSC examined this issue using the premise that competition in the industry is encouraged.

Telecommunications Service Providers

There are several ways to provision telecommunications services in an MTE. One that already exists and is governed by statutes and rules is STS. STS exists when service is provided to tenants through common switching equipment owned and maintained by an entity other than an ILEC. In an STS environment, a tenant has the right to be served by the COLR, in lieu of service through the STS provider, pursuant to Section 364.339, Florida Statutes, and Rule 25-24.575, Florida Administrative Code. This report does not focus on STS providers, nor did any such providers actively participate in the study.

ILECs may also provide telecommunications service in an MTE. An ILEC operating as a COLR has mandated access to tenants in MTEs by operation of Section 364.025, Florida Statutes. As a practical matter, the ILECs, by virtue of their previous monopoly status, already serve the majority of existing MTEs. The Commission does not intend to suggest or recommend any change to the existing COLR responsibilities.

The least invasive competitive telephone service provider in terms of physical access is the reseller. A December 1998, Commission report to the Legislature entitled, *Competition in Telecommunications Markets in Florida*, indicated that most of the ALECs currently operating in

Florida provide service through resale. Service to tenants by resellers is not noticeable or evident to a landlord because no equipment is installed and no access is required. Thus, because resellers require no physical access, none of the issues raised by the landlords apply to access to tenants by resellers.

Facilities-based ALECs provide service using duplicate facilities, equipment, wiring or some combination thereof. It is the physical access by these providers which causes the most controversy. Each facilities-based ALEC, as well as each of the ALEC's customers, may require a different configuration of facilities, equipment, or wiring. Each connection may require additional floor space or conduits or use an entirely different space, such as the roof. For example, one ALEC participating in the workshops requires rooftop access and drops wiring down the outside of a building. Landlords are particularly concerned about being forced to give up rooftop space, exterior walls or additional floor space to what could be an infinite number of telecommunications companies if unrestricted access to tenants were mandated. These issues of providing physical access to the facilities-based carriers are also the issues with the greatest constitutional concerns, because the landlord may be deprived of the use of more of his property than just the "utility closet." Facilities-based ALECs state that the practical reality is that there will be only a few facilities-based competitors in any one MTE. Even so, the constitutional concerns raised by the landlords must be addressed.

Property Rights Issues

All privately-owned land is held subject to some controls by statute or through legislation exercising either the power of eminent domain or the police power, including zoning, or voluntary restrictions such as easements. The state's power over land under eminent domain proceedings, in which just compensation must always be paid to the landowner, includes the power to condemn land for a public purpose and the power to condemn land for a private way of necessity. The state's power over land through the police power is exercised only under specific statutes or ordinances, under which no compensation is paid to the landowner, and includes control for the purpose of protecting the health, safety, and welfare of the public, and zoning ordinances which must be justified as protecting the health, safety, or welfare of the public. The police power, especially the general or public welfare aspect, is an expanding concept and today can encompass promoting

aesthetics and instituting architectural controls.[37] State statutes attempting to exercise police power must be reasonable and not arbitrary or unreasonable. If a statute or ordinance is arbitrary or unreasonable, it either takes property without due process of law or denies equal protection of the laws, or both, under the 14th Amendment of the Constitution of the United States and is unconstitutional and void.

The Fifth Amendment of the U.S. Constitution, Article X of the Florida Constitution, and Chapter 70, Florida Statutes, prohibit the taking of private property for public use without just compensation. Landlords urge us to examine the *Loretto* case in this regard. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), is a cablevision case concerning whether the placement of cable on the roof and down the walls of an apartment building constituted a taking. The case holds that when government action causes permanent physical occupation of property there is a taking, regardless of the level of public benefit or economic impact on the owner. Under *Loretto*, the Court held that, "The power to exclude has traditionally been considered one of the most treasured strands in an Owner's bundle of property rights." *Id.* at 435. Additionally, the *Loretto* opinion dictates that a taking of private property requires that compensation must be paid for any mandatory access provision. *Id.* at 441.

The Florida Supreme Court also invalidated mandatory access laws as unconstitutional. In *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd.*, 493 So.2d 417 (Fla. 1986), the Florida Supreme Court followed *Loretto* and ruled that "the placement of cable television equipment and wiring on apartment complex property (that is not specifically held out for a tenant's use) constitutes a taking." The Court concluded that any takings of private property rights in Florida for the benefit of private parties are unconstitutional. Such unconstitutionality violates Article X, Section 6 of the Florida Constitution which requires that all governmental takings be solely for a public not private purpose.

More recently, the federal courts reviewed takings in a mandatory access case, *Gulf Power Company v. United States of America*, (U.S.D.C., N.D. Fla 1998), and determined that although mandated access to electric utility poles and conduits imposed a taking under *Loretto*, it was not an

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[37]Ralph E. Boyer, *Survey of the Law of Property, 3rd ed.*, West Publishing Company, St. Paul, Minn., 1981, p. 626.

unconstitutional taking because the underlying statute provided for just compensation. Thus, a review of the case law indicates that in order to have a constitutionally viable access law for MTEs, the law must provide just compensation and standards of reasonableness.

Mandatory access to tenants without just compensation by certificated telecommunications companies may also adversely affect the landlord's property interest and violate Section 70.001(1), Florida Statutes. The Florida Legislature specifically addressed access to private property rights by promulgating The Bert J. Harris, Jr. Private Property Rights Protection Act, Section 70.00 *et seq., Florida Statutes*, in 1995. Section 70.001(1), Florida Statutes, states, in pertinent part:

> The Legislature recognizes that some laws, regulations and ordinances of the state and political entities of the state, as applied, may inordinately burden, restrict[s] or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Ensuring access to tenants in MTEs can be distinguished from takings issues in *Loretto* because MTEs already have property dedicated to public use for the purpose of providing telecommunications service. To the extent that any competitive carrier coming into an MTE requires no more space than that already dedicated to public use, there cannot be a taking. If the ILEC does not compensate the landlord for access to the space used in a building, is it fair to require the ALEC to compensate the landlord for space already set aside for telephone or other utility services? If there is an existing carrier in an MTE, the landlord has already given up his right to exclusive use and possession of certain space in his building. Therefore, the landlord cannot complain that access by additional carriers creates a taking where access by the first service provider did not. However, to the extent that additional carriers need to occupy space not planned or contemplated for public use, compensation may be required to satisfy constitutional concerns. Compensation issues are addressed separately in a later section of this report.

As mentioned above, landlords stated that they were concerned with the issue of easements. For example, the FAA was concerned with possibly having to install cable across one apartment

dweller's unit in order to provide access to another tenant. In order to install cable across space in the possession of a tenant, that tenant would have to agree to such interference with his property unless other cable was already there. If cable was already there, then an easement already exists for access to that space. On the other hand, if no previous easement exists, then an easement to use the tenant's property would be required before access could be completed. Currently, the Commission has a rule on easements which only applies to ILECs. However, the rule provides that in certain instances all necessary easements and rights-of-way must be furnished by the subscribing customer at no cost to the ILEC, Rule 25-4.090, Florida Administrative Code. At our workshops, the landlords believed that telecommunications companies should assume the responsibility for costs related to easements and rights-of-way. ALECs stated that bearing the responsibility for costs related to easements may create an additional impediment to obtaining new customers. Based on experience with the existing rule, the Commission believes that in MTEs the obtaining of all necessary easements should be the responsibility of the tenant.

Landlords were also concerned about safety and liability related to allowing multiple carriers access to tenants. Currently, ALECs are governed by Rules 25-24.800 et seq., Florida Administrative Code. Rule 25-24.835, Florida Administrative Code, incorporates certain ILEC rules and applies these rules to ALECs. Specifically incorporated is Rule 25-4.035, Safety, Florida Administrative Code, which provides as follows:

> Each utility shall at all times use reasonable efforts to properly warn and protect the public from danger, and shall exercise due care to reduce the hazards to which employees, customers, and the public may be subjected by reason of its equipment and facilities.

In addition, ALECs are required to follow the National Electric Code and to ensure safety of persons and property pursuant to Rule 25-4.036, Design and Construction of Plant, Florida Administrative Code, which is also incorporated by reference in Rule 25-24.835, Florida Administrative Code. The provisions of Rule 25-4.036, Florida Administrative Code, address some of the safety and liability concerns of landlords:

> (1) The plant and facilities of the utility shall be designed, constructed, installed, maintained and operated in accordance with provisions of the 1993 Edition of the National Electrical Safety Code (ANSI C2-1993), except that Rule 350G of the safety code shall be effective for cable installed on or after January 1, 1996, and the National

Electrical Code (NFPA 70-1993), pertaining to the construction of telecommunications facilities.

(2) Compliance with these codes and accepted good practice is necessary to insure as far as reasonably possible continuity of service, uniformity in the quality of service furnished and the safety of persons and property.

Negotiations

Comments presented at the workshops indicated that some telecommunications providers have been able to successfully negotiate terms and conditions with landlords for facilities-based services in MTEs. To establish the extent of any access problem, the FPSC sent a data request to 83 participants. The data request asked four questions:

1. Are you aware of any specific instances during 1997 in which a landlord or building owner denied or limited access to an alternative telecommunications provider for the installation of telecommunications equipment? If so, please describe these instances.

2. Are you aware of any tenants in multitenant environments, where local telecommunications service was provided through the landlord, who were unable to obtain local service from an alternative provider during 1997? If so, please describe these instances.

3. Please describe or provide a copy of any agreements designed to provide telecommunications service in multitenant environments, including marketing agreements, exclusive contracts, and leases.

4. Please provide any other information or material that you believe would be useful to staff in its analysis of access by telecommunications companies to customers in multitenant environments.

Thirteen responses to the data request were filed. Teligent, an ALEC, responded that building owners typically limit access to tenants in two ways: "they either simply refuse to negotiate with Teligent, or they 'negotiate' for an exorbitant price, effectuating the same result." Seven specific examples of this behavior were cited by Teligent. TCG, another ALEC, provided a list of twelve buildings in the Miami and Fort Lauderdale area in which it has attempted to negotiate an access or lease arrangement with no success. The reasons cited by TCG for these failures included: (1) the building owner had an exclusive contract with BellSouth; (2) excessive demands; (3) unequal compensation; and (4) the owner simply would not respond to TCG.

BOMA, on the other hand, indicated that responses to its tenant survey showed no access-related problems between tenants in MTEs and ALECs. However, this may be because competition

in this area is relatively new and tenants may not be aware of the various types of telecommunications services being marketed to their landlord as opposed to them directly.

Throughout the workshops, it was evident that most participants shared the position that the use of good-faith negotiations between a landlord and a telecommunications provider would, in most cases, be sufficient to resolve access-related issues.[38] All participants should be encouraged to continue negotiating all aspects of MTE access. The landlords should be responsible for determining the common area dedicated to utility equipment. This space could contain equipment from multiple utilities such as electricity, natural gas, and other telecommunications companies. Ancillary space required for the installation of cables or wires such as conduits, risers, and raceways should also be the responsibility of the landlord. If a landlord were to deny access to an ALEC seeking to install telecommunications equipment, the landlord should be required to demonstrate that a preexisting condition, such as insufficient conduit space or floor area, precludes access.

To move the telecommunications industry closer to competition, reasonable, nondiscriminatory, and technologically neutral access to tenants in MTEs should be encouraged. Traditionally, because telecommunications services in MTEs were delivered by a monopoly provider, aesthetics, the size of dedicated floor space, and other physical and constitutional constraints have not been at issue. However, even installations by ILECs have been subject to a property owner's reasonable conditions. This should also be true in the new era of competition. Access to tenants in MTEs should be subject to a test of reasonableness. That is, a landlord may be allowed to place reasonable conditions on installations, as necessary, to protect the safety, functionality and appearance of the premises, and the convenience and well-being of the tenants. Similarly, security and liability are legitimate concerns which may be addressed between landlords and providers when negotiating the installation of service. Reasonable accommodations consistent with Commission service standards for emergency repairs, timely installation, and liability should also be negotiated.

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[38]FPSC Document Number 10764, pp. 26-28, 36-42, 44-48, 52-54, 78-79, 87-88, and 92.

Exclusionary Contracts and Marketing Agreements

ALECs believe that exclusionary contracts should be prohibited. Building owners support the use of such contracts because there are efficiencies and economies associated with such contracts. An exclusionary contract is an agreement between a landlord and a telecommunications company in which the telecommunications company is given exclusive access to tenants in the landlord's building. Exclusionary contracts bar access to tenants by any competitors. Exclusionary contracts are inherently anticompetitive and should, therefore, be prohibited as being against public policy.

Marketing agreements were also discussed in the workshops. The participants were not as strongly divided on the issue of marketing agreements as they were on the use of exclusionary contracts. In a marketing agreement, the telecommunications company agrees to pay the landlord some form of remuneration for each tenant subscribing to the contracting telecommunications company's services. These contracts are not as blatantly anticompetitive as exclusionary contracts. However, they impede competition because the landlord would encourage tenants to be served by one telecommunications company over others. As these agreements are more in the nature of a "finders fee" arrangement and do not prohibit access, they should not be prohibited at this time. However, landlords should disclose to potential tenants the existence of a marketing agreement.

Conclusion

Issues associated with access to tenants by facilities-based ALECs appear to be the most controversial aspect of access in MTEs. Currently, there are only a limited number of facilities-based ALECs providing telecommunications service in Florida. Landlords' concerns that they may be deprived of the use of more property than just the "utility closet" are mitigated by the practical reality that there will only be a few facilities-based competitors in any one MTE. However, as competition in the telecommunications industry is encouraged, the landlords' property rights should be protected by applying standards of reasonableness to the terms and conditions of access in MTEs.

All parties involved in telecommunications access in MTEs should be encouraged to continue to negotiate in good faith using reasonable and nondiscriminatory standards. Tenants should be responsible for obtaining all necessary easements. Recommended standards for

reasonable, nondiscriminatory, and technologically neutral access are identified in the section on jurisdiction.

Exclusionary contracts between telecommunications companies and landlords are anticompetitive and should be against public policy. Therefore, exclusionary contracts should not be permitted in MTEs.

There was also discussion of marketing agreements in which a landlord is compensated for a tenant's becoming a customer of a particular telecommunications company. While these agreements are not as egregious and offensive to competition as exclusionary contracts, their use can result in discriminatory behavior, because the landlord who enters into such an agreement has a vested interest in each new customer subscribed under the marketing agreement. Therefore, landlords should disclose to potential tenants the existence of a marketing agreement.

COMPENSATION

Issue 5: Are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is the cost to be determined?

Recommendation: The Commission recommends that all costs related to access should be reasonable and nondiscriminatory. However, a fee imposed solely for the privilege of providing telecommunications service in an MTE creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it will develop rules in order to set standards for determining compensation for costs related to access.

Summary of Initial Positions

BellSouth: Except to the extent that COLR tariffs and the Commission's Rules address the issue of granting easements and support structures, no other legislative or regulatory dictates should be established relative to financial arrangements reached between owners, carriers, and tenants. When operating out of its franchised territory as an ALEC, with the freedom to serve or not serve, BellSouth will negotiate all terms and conditions of service with tenants and owners, regardless of whether or not other carriers offer service to the subject property.

GTE: A multitenant location owner should not be allowed to charge access for an essential element in the delivery of telecommunications to the tenant. Telecommunications firms should not be required to pay multitenant location owners for the ability to terminate network facilities that are needed to provide services to tenants of the MTE and that are essential to the public welfare and a necessary part of the building or property infrastructure. Costs for all types of facilities and other common area costs should be recovered from tenants through normal rental payments.

Sprint: The costs of installing the necessary facilities at the property should be included in the rental charge or allocated as a matter of separate contract between the landlord and tenant, but should not involve the carrier. Unless an MTE owner can recover these costs from the customer requesting the service, forcing carriers to pay these costs creates an implicit subsidy in favor of MTE tenants.

Cox: Building owners should provide access to interbuilding wiring and intrabuilding wiring at no cost to the service providers. Access to phone service should be treated similarly to other utility service. If access is applied to all telecommunications service providers on a nondiscriminatory basis, a reasonable fee for equipment space rental only may be appropriate.

e.spire: The critical issues with respect to compensation are: 1) compensation must be nondiscriminatory; 2) at a minimum, compensation cannot be required until the ILEC is actually paying compensation to the landlord; and 3) compensation should not exceed the landlord's cost of providing access.

Intermedia: Access should be offered on a competitively neutral basis. Where access requires a more obtrusive presence, the terms and conditions of that access should be negotiated among the affected persons.

OpTel: Landlords, owners, building managers, and condominium associations or their agents should be able to impose reasonable and nondiscriminatory charges for the use of customer premise equipment by carriers.

TCG: If building owners may require telecommunications service providers to pay reasonable and nondiscriminatory compensation for physical occupation of common property by facilities used to provide service to customers in MTEs, the Commission should be authorized to determine just compensation for purposes of the Fifth Amendment Takings Clause, subject to judicial review. Compensation should be determined pursuant to nondiscriminatory rates set by the Commission reflecting the actual cost to the MTE owner of making the required space available for installation of telecommunications equipment of the particular service provider.

Teligent: Equal and nondiscriminatory access to tenants in MTEs should be applied to all telecommunications carriers. Ideally, access should be granted for free or subject to a nominal fee inasmuch as the ILEC is rarely charged. Reasonable compensation may vary depending upon the level of access required and the amount of space that will be occupied.

Time Warner: Supports affirmation of the Commission's jurisdiction over matters of building access and adoption of the following broad policies: 1) reasonable compensation for use of equipment space and installation of conduit and wiring in an MTE shall be presumed diminimus unless a property owner offers evidence to rebut the presumption, 2) a prohibition on the imposition

of any fee for the use of raceways and ceiling space, and 3) a prohibition on building owners from requiring competitive service providers to pay for building access unless the incumbent provider is immediately subject to the same compensation terms for both existing and new facilities in the building.

WorldCom: If the building owner provides space for telecommunications equipment, then the telecommunications provider should make the owner whole. However, any access requirement should be revenue neutral to the building owner.

BOMA: Landlords have the constitutional authority to require all service vendors desiring to do business with tenants in their buildings to pay license, access, or other fee compensation as a condition of gaining access to their buildings and tenants. All terms and conditions with respect to access, including compensation should be subject to consent agreements between the landlord and the telecommunications provider.

CAI: Any compensation to be provided community associations for the use of common property should be freely negotiated between telecommunications service providers and community associations. The state should not intervene in this process.

FAA: Compensation in the non-owner residential setting is appropriate on a limited basis. Property owners should have the right to sell or lease their property (i.e., physical space or wiring) for fair market value.

FAHA: Did not submit a response on this issue.

ICSC: Any compensation is reasonable if agreed to by the building owner and the telecommunications provider. The reasonableness of compensation is market driven and it cannot and should not be arbitrarily measured or fixed by the FPSC or the Legislature.

REALTORS: Compensation should be required for space occupied, renovations, repairs, after-hour entry, after-hours costs for building security, maintenance, etc. Actual compensation should be determined by contract. However, conditions should not be discriminatory.

Analysis

The issue of compensation was raised in connection with fees and costs for access to physical space in the common areas designated for utility services. The position of the property owners and

landlords is that they are constitutionally entitled to compensation for space occupied, renovations and repairs, and after-hours access. In their opinion, to mandate access by all telecommunications companies without any compensation would be an unconstitutional taking. Competitive ALECs believe there should be nondiscriminatory access to all tenants in an MTE. The ILECs believe that no fee should be required of them as long as they are serving as COLR. Where the ILECs are guaranteed access to MTEs without being required to pay a fee and the same is not provided to ALECs, a competitive disadvantage may be created and this may impede competition.

In most MTEs the ILEC has historically incurred the costs of installation for the purpose of serving tenants but has not paid a fee for that access. Ongoing costs related to the repair and maintenance of equipment are typically borne by the ILEC. Similarly, the provisions creating competition allow an MTE to be served by a facilities-based ALEC, which may install and own lines in the building.

At the present time, the only provision for an ILEC, serving as the COLR, to pay access costs relating to providing service to a customer in an MTE is in the Commission's rule on STS. Rule 25-24.575 (7) Florida Administrative Code, states:

> The carrier of last resort of local exchange telecommunication services shall use the STS provider's or the STS building owner's cable, if made available, to gain access to the tenant. The carrier of last resort of local exchange telecommunication services shall be required to provide reasonable compensation. Such compensation shall not exceed the amount it would have cost the carrier of last resort of local exchange telecommunication services to serve the tenant through installation of its own cable. This cost must be calculated on a pro rata basis.

The costs which are borne by COLRs in STS environments are those associated with the use of existing equipment owned by the building owner or the STS provider. The Commission does not intend to suggest or recommend any change to the existing STS rule or COLR responsibilities.

In addition to costs directly related to installation of facilities, the compensation issue also encompasses fees related to access. The issue of landlords charging a fee for access to their buildings has been contentious in this proceeding. The nightmare of innumerable companies demanding and being absolutely entitled to infinite floor space, roof access, and 24 hour repair access was well explicated by property owners and landlords. These concerns are well-founded to a limited extent; however, they are mitigated by two factors: (1) resellers do not require physical

access or space; and (2) economic efficiencies will limit the number of facilities-based ALECs interested in serving an MTE. As discussed in an earlier portion of this report, any reseller wishing to provide service to a customer in an MTE does not require physical access or floor space for equipment. The costs for providing reseller service are governed by an interconnection agreement between the existing service provider in the building and the reseller. Thus, access to tenants in an MTE by a reseller is totally "transparent" to building owners.

Demand for floor space and access to buildings by facilities-based carriers will be limited by economics. That is to say, a company will be willing to install its equipment in a building only if it believes that it will get sufficient return on its investment. This practical reality was discussed in the last workshop, and participants agreed that there would be some limitation, as a "practical business matter," on the number of facilities-based carriers coming into an MTE. It should be noted that in discussing facilities-based carriers, the FPSC is referring to any equipment or facilities being installed, some installations being more comprehensive or requiring more space or access than others.

Although landlords argue that access to tenants by telecommunications companies without compensation would constitute an unconstitutional taking, that argument fails where the property being used to provide telecommunications services or to hold equipment has already been designated for utility use and dedicated to public use. Reasonable access without compensation for use of property already surrendered for utility purposes does not constitute a taking. However, such space is finite and some consideration must be given to instances where the designated utility space in an MTE is inadequate for a particular carrier's needs.

To the extent a facilities-based carrier installs equipment in an area already surrendered for utility purposes, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space in an MTE is inadequate for a particular carrier's needs, such as when the existing floor space or conduit is insufficient or an entirely different space is required, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry and is not in the public interest.

Conclusion

Any costs charged to telecommunications companies by landlords should be reasonable and nondiscriminatory. To the extent a facilities-based carrier installs equipment in an area already dedicated to public use, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space is inadequate for a particular carrier's needs, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it should develop rules in order to set reasonable standards for determining compensation for costs related to access. The Commission's recommended standards for reasonable, nondiscriminatory, and technologically neutral access are set forth in the section on jurisdiction.

However, if it is determined by the Legislature that landlords may collect a fee for access, over and above the actual costs for installing facilities, any statute addressing that issue should also address whether space already being provided for no fee would then become subject to fees and whether the COLR providing mandated service must pay any fee at all. Further, no such fee may be charged to tenants unless the landlord is a certificated telecommunications company.

JURISDICTION

Issue 6: What is the proper forum for settling disputes and property claims regarding access to tenants in MTEs by telecommunications companies, i.e., Florida Public Service Commission, district court, legislative action, other?

Recommendation: Adopting legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications services providers. Any legislation developed should specifically describe the forum for resolving access-related disputes. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the Commission recommends that it is the appropriate authority for resolving access issues.

The FPSC recommends that a threshold for bringing disputes and standards for review should be as follows:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

Summary of Initial Positions

Given that preserving the integrity of E911 was the original sixth issue, not all participants provided written or oral opinions regarding the jurisdiction issue. To the extent that positions were enunciated, they are summarized below.

BellSouth: If the FPSC believes its authority over access issues is unclear, it should obtain a clarification from the Legislature. However, access should be a matter of free market negotiations between the property owner, end user(s), and the carrier.

Cox: On the limited issue of marketing agreements, as long as the term of the agreement relates to the provision of local exchange service the Commission has jurisdiction.

e.spire, **Teligent**, and **Time Warner**: The Commission's broad jurisdiction to promote telecommunications competition extends to tenant end users in MTEs and serves as the jurisdictional basis for mandating direct and nondiscriminatory access. Notwithstanding the Supreme Court opinions to the contrary, should the Commission believe its authority does not permit it to require MTE owners to allow nondiscriminatory telecommunications company access to tenant end users, it should request such authority from the Legislature.

Intermedia: There is concurrent jurisdiction in some areas. The circuit court's jurisdiction is granted under Article 5 of the Florida Constitution, and the FPSC cannot do certain things such as adjudicate contracts, award damages, or provide injunctive equitable relief. There is primary jurisdiction doctrine that says where a court has its own jurisdiction and there appears to be concurrent jurisdiction, it will often defer to the FPSC to do something that looks like fact finding with a special master, and that decision can be used and presented to a jury in a court trial.

TCG: The federal district court stated in the *Gulf Power* case that the statutory scheme under which the FCC would resolve a dispute concerning rates for access to electricity poles subject to judicial review overcame the constitutional taking objection. TCG believes that, to the extent there is a taking, a similar statutory scheme authorizing the FPSC to resolve compensation disputes, subject to judicial review, would be valid and lawful. TCG urges the Commission to request from

the Legislature the requisite authority to allow nondiscriminatory telecommunications company access to tenant end users in MTEs.

BOMA: It is not at all clear that an administrative body like the Commission is permitted to determine just compensation. Under *Monongahela*, neither the Florida Legislature nor the Commission may establish compensation to be paid to a building owner who is forced to permit the physical occupation of his property.

FAA: The Court system is the proper venue for resolving access-related disputes.

Analysis

Generally, the participants in this special project wanted the current jurisdiction to remain with the present institutions. Building owners wanted mandatory multitenant access to be an issue dealt with in the circuit court. Specifically, the FAA remarked that the Constitution mandates that the court has to have some jurisdiction for a mandatory access law. Additionally, the FAA pointed out that if the Commission is made a venue for disputes pertaining to multitenant access then hundreds of thousands of condominiums, not even including the homeowners associations and malls, would open a floodgate of access issues that the Commission would not be able to handle. The ALECs indicated that it would also be difficult to leave the courts out of the process.

Similarly, it was also recognized that jurisdiction can be overlapping and some issues are exclusive to either the courts or the FPSC but others can be shared. However, BellSouth purported that access to telecommunications services is an area over which the Commission has jurisdiction.

As the issues and positions developed through the workshop process, participants wanted to explore the issue of what court or agency would have jurisdiction over disputes arising from legislation proposed, if any, as a result of this study. This section addresses the Commission's current authority, property rights law, contract law, and recommended standards for review of access issues.

Authority of the FPSC

Jurisdiction for dispute resolution of mandatory access to private property owners by telecommunications carriers has been enumerated under the U.S. Constitution, the Florida Constitution, statutory authority, and case law. Either express or implied statutory authority has to

exist for the FPSC to regulate telecommunications providers. The FPSC is an administrative agency created by the Legislature, and as such, "the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973).

The Florida Constitution allows administrative commissions to exercise quasi-judicial power in matters connected with the functions of their offices. Quasi-judicial power is vested in the FPSC by Article V, Section 1, Florida Constitution: "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."

Section 364.01, Florida Statutes, grants the Commission exclusive jurisdiction in regulating telecommunications providers and services. Pursuant to Section 364.01(1), Florida Statutes, "The Florida Public Service Commission shall exercise, over and in relation to telecommunications companies, the powers conferred by this chapter." Section 350.011, Florida Statutes, confers on the FPSC exclusive jurisdiction to "regulate and supervise each public utility with respect to its rates and service." Pursuant to Section 364.01(3)(a), Florida Statutes, the FPSC is also charged with exercising exclusive jurisdiction in order to "protect the public health, safety, and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices."

The Commission's expertise does not lie in the areas of property and contract law. The Commission has vast experience in resolving disputes between customers and utilities in assuring quality and reliability of service. The Commission has more recently gained expertise in contract arbitration and interpretation under the Act.

Jurisdiction Over Property Rights

Judicial powers are granted to state courts pursuant to Article V of the Florida Constitution. Traditionally, the state courts have exercised authority over property law disputes. Property rights can be distinguished from telecommunications law as a fundamental constitutional right under both the Fifth Amendment (applied to the states via the Fourteenth Amendment) of the U.S. Constitution and Article X, Section 6, of the Florida Constitution (governs the State's power of eminent domain,

the taking power).[39] The Commission does not currently have authority to adjudicate property rights issues. Therefore, any legislation drafted should include a specific delineation of jurisdiction.

Jurisdiction Over Contracts

The FPSC has limited jurisdiction in contract disputes. Historically, contract disputes between parties have been settled in the state courts. In 1997, the Supreme Court of Florida held that the Commission lacked authority to decide private contract issues between a telecommunications company and a multitenant condominium owners' association. In *Telco Communications Co. v. Clark*, 695 So.2d 304 (Fla. 1997), the Commission determined that a telecommunications company was required to obtain a certificate of necessity and found that the company had no legitimate claim for nonperformance of the lease agreement contract from the association for inside wire. The Florida Supreme Court held that there was no statutory authority, express or implied, for the Commission's ruling on the type of contract issue involved and further decided that the resolution of contractual issues should be decided by the circuit court. *Id.* at 309. The FPSC lacks authority to resolve any private contract issues between telecommunications companies and building owners. Additionally, parties can not confer jurisdiction on the Commission by the language in the contract. *United Telephone Co. of Florida v. Florida Public Service Comm'n*, 496 So.2d 116, 118-19 (Fla. 1986).

To the extent that some Circuit Court proceedings involve both regulatory and contractual disputes or require the FPSC's expertise for resolution, the courts may defer to the Commission's expertise and exclusive jurisdiction on regulatory issues. The Supreme Court in *Telco* granted the motion for referral to the FPSC for the regulatory matters over which the Commission had jurisdiction, but retained jurisdiction over the contract issues. *Telco.* at 307. In *Southern Bell Tel. & Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780 (Fla. 1984), the court also held that the FPSC was authorized to review intrastate toll settlement agreements and disapprove any such agreement if detrimental to the public interest where the Legislature had given the Commission

[39]Article X, Section 6 of the Florida Constitution strictly mandates that takings of private property should be for the public, not a private purpose. Section 6 provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

statutory authority to adjudicate such disputes as are properly related to the Commission's essential function as regulator of utility rates and services. *Id.* at 783.

The Act requires state commissions to review negotiated agreements between telecommunication companies. Both Chapter 364, Florida Statutes, and the Act encourage parties to enter into negotiated interconnection agreements to implement competition. The FPSC has been given exclusive jurisdiction to either reject or approve such agreements under §47 U.S.C. 252(e).[40] Furthermore, the FPSC has jurisdiction to arbitrate any unresolved issues of telecommunication agreements.[41] Property owner contractual agreements with third parties do not fall under the Act. The authority provided to the FPSC to evaluate the negotiated agreements of telecommunication companies is narrowly construed and does not include contracts between third parties and property owners. Any expertise the Commission has in the area of contract law is specifically related to our expertise and authority in regulated industries.

All compensation is not purely contractual as discussed in an earlier portion of this report. There are cost-related issues over which the FPSC has jurisdiction. Section 364.345(b), Florida Statutes, gives the FPSC jurisdiction to prescribe the type, extent and conditions under which STS may be provided. Thus, the FPSC has exclusive jurisdiction in STS cases to determine costs related to the provision of service.

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[40]Section 252(e)states:

(1) Approval required.--Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Grounds for rejection.--The State commission may only reject--

"(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

"(I) the agreement(or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

"(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

[41]Section 252(b)(1) states:

(1) Arbitration--During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Standards for Review

As stated earlier, any legislation on access should have a standard of reasonableness and provide compensation for use of property. States such as Texas and Connecticut have passed legislation which defines the terms under which access is to be given and compensation is to be paid. Legislation in these states is fairly new and has not been tested in the courts. In the majority of states where access legislation has been passed, the states' utility commissions have been given authority over access issues in MTEs. If reasonable, nondiscriminatory access is mandated in Florida, any disputes should be resolved following enunciated standards. In addition, a threshold for bringing disputes to appropriate forum for resolution should be developed. Based on the prior controversy at the Legislature, the polarization of the participants in the workshops, the growth of competition, and the instances of problems related to access experienced by the ALECs, legislation may be appropriate. Legislation would give all parties the guidelines necessary for access, may serve to lessen the polarization between them, and should serve to reduce impediments to competition in telecommunications.

The standards for review of an access problem should first consider a threshold for initiating an action for access. To determine whether an access problem is ripe for resolution, there must first be a request for service to a telecommunications service provider by a tenant. The provider and the tenant must convey the request for access to the landlord. If the landlord is unresponsive, a written request should be submitted. A denial of access by the landlord should explain the basis for denial. If the telecommunications service provider and the tenant believe that the denial is unreasonable, discriminatory, or not technologically neutral, then, at that time, the dispute becomes ripe for resolution. The tenant and the provider would then file a complaint or petition to the appropriate forum.

The following standards should apply in negotiating access or in determining whether a denial of access is reasonable:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.

Conclusion

For purposes of this report, the FPSC concludes that its limited jurisdiction in matters of property rights and contract disputes should be considered if any legislation is passed regarding access in MTEs. The FPSC would not have authority over controversies pertaining to mandatory multitenant access without specific legislative authority. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the FPSC recommends that the Legislature should specifically prescribe authority to the FPSC to determine issues such as: whether there is space for equipment; whether access to tenants is reasonably denied; the conditions for access; costs for access; and any other related issues. This will avoid any unnecessary confusion between the Commission's jurisdiction and the jurisdiction of the state courts. Any such legislation should define the threshold for initiating an action for access and the standards for review.

RECOMMENDATIONS

DEFINITION OF MULTITENANT ENVIRONMENT

Issue 1: How should multitenant environment be defined? That is, should it include residential, commercial, transient, call aggregators, condominiums, office buildings, new facilities, existing facilities, shared tenant services, other?

Conclusion

If the goal of the state and federal telecommunication legislation is to create an environment that enhances opportunities for customers to benefit from competition, then the definition of MTE should be broad. Based on the comments filed by the participants and the focus on encouraging competition, the Commission concludes that the definition of MTE should be inclusive of all types of structures and tenancies except condominiums, cooperatives, homeowners' associations, those short-term tenancies specifically included in the FPSC's call aggregator rule, and all tenancies of 13 months or less in duration. The conclusion to exclude condominiums, cooperatives, and homeowners' associations is based on the premise that these organizations are operated through a democratic process with each owner having a vote. Tenancies of 13 months or less are also excluded in order to ensure that landlords are not inordinately burdened by the requirement to provide access for short-term tenancies that are not described in the call aggregator rules.

Recommendation

The Commission recommends that the definition of MTE should be inclusive of all types of structures and tenancies except: (1) condominiums, as defined in Chapter 718, Florida Statutes; (2) cooperatives, as defined in Chapter 719, Florida Statutes; (3) homeowners' associations, as defined in Chapter 617, Florida Statutes; (4) those short-term tenancies specifically included in Rule 25-24.610(1)(a), Florida Administrative Code; and (5) all tenancies of 13 months or less in duration.

DEFINITION OF MULTITENANT ENVIRONMENT TELECOMMUNICATIONS SERVICES

Issue 2: What telecommunications services should be included in "direct access," i.e., basic local service (Section 364.02(2), Florida Statutes), Internet access, video, data, satellite, other?

Conclusion

Support for limiting the definition of telecommunications services to those currently regulated under Chapter 364, Florida Statutes, is not overwhelming. However, the rapid growth and deployment of unregulated communications technologies (e.g., wireless, rooftop satellite dishes, video conferencing, coaxial cable voice and data services, etc.), may render any new broader statutory definition obsolete in a short time. Therefore, the services to which access applies should be limited to two-way telecommunications service to the public for hire within this state, pursuant to Section 364.02, Florida Statutes.

Recommendation

For purposes of MTE access, the Commission recommends that the definition of telecommunications services, as defined in Section 364.02, Florida Statutes, should not be amended.

DEFINITION OF DEMARCATION POINT

Issue 3: How should "demarcation point" be defined, i.e., current FPSC definition (Rule 25-4.0345, Florida Administrative Code) or the federal Minimum Point of Entry (MPOE)?

Conclusion

Keeping the demarcation point as set forth in Rule 25-4.0345, Florida Administrative Code, versus moving to the MPOE is an issue that merits additional investigation by the FPSC. Moving to the MPOE may resolve some access issues by possibly giving the ALECs quicker access to the wiring; however, the inhibiting of the COLRs' ability to deliver service standards directly to the customer and allowing the possibility of an unregulated third party becoming a factor in service may outweigh the benefits of moving to the MPOE. Therefore, the Commission will conduct a staff workshop to gather information on the efficacy of rulemaking. At the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

Recommendation

Information gathered at the workshops did not lead to a conclusion on whether the current FPSC demarcation point should be changed to the federal MPOE. Therefore, the Commission will gather additional information through a staff workshop on how demarcation should be defined. At

the conclusion of the workshop, if there is sufficient reason for rulemaking, a proceeding will be initiated.

CONDITIONS FOR PHYSICAL ACCESS

Issue 4: In promoting a competitive market, what, if any, restrictions to direct access to customers in MTEs should be considered? In what instances, if any, would exclusionary contracts be appropriate and why?

Conclusion

Issues associated with access to tenants by facilities-based ALECs appear to be the most controversial aspect of access in MTEs. Currently, there are only a limited number of facilities-based ALECs providing telecommunications service in Florida. Landlords' concerns that they may be deprived of the use of more property than just the "utility closet" are mitigated by the practical reality that there will only be a few facilities-based competitors in any one MTE. However, as competition in the telecommunications industry is encouraged, the landlords' property rights should be protected by applying standards of reasonableness to the terms and conditions of access in MTEs.

All parties involved in telecommunications access in MTEs should be encouraged to continue to negotiate in good faith using reasonable and nondiscriminatory standards. Tenants should be responsible for obtaining all necessary easements. Recommended standards for reasonable, nondiscriminatory, and technologically neutral access are identified in the section on jurisdiction.

Exclusionary contracts between telecommunications companies and landlords are anticompetitive and should be against public policy. Therefore, exclusionary contracts should not be permitted in MTEs.

There was also discussion of marketing agreements in which a landlord is compensated for a tenant's becoming a customer of a particular telecommunications company. While these agreements are not as egregious and offensive to competition as exclusionary contracts, their use can result in discriminatory behavior, because the landlord who enters into such an agreement has a vested interest in each new customer subscribed under the marketing agreement. Therefore, landlords should disclose to potential tenants the existence of a marketing agreement.

Recommendation

The Commission recommends that ILECs, ALECs, landlords, and tenants be encouraged to negotiate all aspects of MTE access in good faith. Negotiations should be based on the premises of reasonable and nondiscriminatory access to MTEs. The Commission further recommends that tenants should be responsible for obtaining all necessary easements.

The Commission recommends that exclusionary contracts are against public policy and should be prohibited. Marketing agreements are not as anticompetitive as exclusionary contracts. However, the Commission recommends that landlords disclose to potential tenants the existence of a marketing agreement.

COMPENSATION

Issue 5: Are there instances in which compensation should be required? If yes, by whom, to whom, for what, and how is the cost to be determined?

Conclusion

Any costs charged to telecommunications companies by landlords should be reasonable and nondiscriminatory. To the extent a facilities-based carrier installs equipment in an area already dedicated to public use, and the existing carrier obtained access to that space at no charge, additional carriers should also be provided access at no charge. However, where the designated utility space is inadequate for a particular carrier's needs, reasonable compensation should be provided to the landlord. The landlord may also be entitled to recover reasonable and nondiscriminatory costs associated with the maintenance and repair of telecommunications equipment. However, a fee imposed solely for the privilege of obtaining access creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it should develop rules in order to set reasonable standards for determining compensation for costs related to access. The Commission's recommended standards for reasonable, nondiscriminatory, and technologically neutral access are set forth in the section on jurisdiction.

However, if it is determined by the Legislature that landlords may collect a fee for access, over and above the actual costs for installing facilities, any statute addressing that issue should also address whether space already being provided for no fee would then become subject to fees and

whether the COLR providing mandated service must pay any fee at all. Further, no such fee may be charged to tenants unless the landlord is a certificated telecommunications company.

Recommendation

The Commission recommends that all costs related to access should be reasonable and nondiscriminatory. A fee imposed solely for the privilege of providing telecommunications service in an MTE creates a barrier to competitive entry; therefore, it is not in the public interest and should not be allowed. To the extent the Commission has jurisdiction, it will develop rules in order to set standards for determining compensation for costs related to access.

JURISDICTION

Issue 6: What is the proper forum for settling disputes and property claims regarding access to tenants in MTEs by telecommunications companies, i.e., Florida Public Service Commission, district court, legislative action, other?

Conclusion

For purposes of this report, the FPSC concludes that its limited jurisdiction in matters of property rights and contract disputes should be considered if any legislation is passed regarding access in MTEs. The FPSC would not have authority over controversy pertaining to mandatory multitenant access without specific legislative authority. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the FPSC recommends that the Legislature should specifically prescribe authority to the FPSC to determine issues such as: whether there is space for equipment; whether access to tenants is reasonably denied; the conditions for access; costs for access; and any other related issues. This will avoid any unnecessary confusion between the Commission's jurisdiction and the jurisdiction of the state courts. Any such legislation should define the threshold for initiating an action for access and the standards for review.

Recommendation

Adopting legislation which sets forth standards for reasonable, nondiscriminatory, and technologically neutral access would assist in resolving the controversies between the landlords and telecommunications services providers. Any legislation developed should specifically describe the forum for resolving access-related disputes. Jurisdiction for resolving access could remain with the state courts; however, granting jurisdiction to the Commission would having the following advantages: (1) Commission experience in all aspects of the telecommunications industry, (2) Commission contract experience in access and arbitration issues under the federal act, and (3) uniformity of decisions on a statewide basis. For these reasons, the Commission recommends that it is the appropriate authority for resolving access issues.

The FPSC recommends that a threshold for bringing disputes and standards for review should be as follows:

1. Tenants, landlords, and telecommunications providers should make every reasonable effort to negotiate access to a tenant requesting service.

2. A landlord may charge a utility or tenant the reasonable and nondiscriminatory costs of installation, easement, or other costs related to providing service to the tenant.

3. The tenant should be responsible for obtaining all necessary easements.

4. A landlord may impose conditions reasonably necessary for the safety, security, and aesthetics of the property.

5. A landlord may not deny access to space or conduit, previously dedicated to public service, if that space or conduit is sufficient to accommodate the facilities needed for access.

6. A landlord may deny access where the space or conduit required for installation is not sufficient to accommodate the request or where the installation would harm the aesthetics of the building.

7. A landlord may not charge a fee solely for the privilege of providing telecommunications service in an MTE.